

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL 29 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

NEALE E. SMITH and ANA ELVA)	2 CA-CV 2010-0095
SMITH, husband and wife,)	DEPARTMENT A
)	
Plaintiffs/Appellants,)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
v.)	Rule 28, Rules of Civil
)	Appellate Procedure
CITY OF TUCSON; MICHAEL RANKIN,)	
as an individual and in his official capacity;)	
WILLIAM NAVARRO, as an individual)	
and in his official capacity,)	
)	
Defendants/Appellees.)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20097084

Honorable Carmine Cornelio, Judge

AFFIRMED

Neale E. Smith and Ana Elva Smith

Tucson
In Propria Personae

Michael G. Rankin, City Attorney
By Blake Ashley

Tucson
Attorneys for Defendants/Appellees

H O W A R D, Chief Judge.

¶1 Ana and Neale Smith (collectively the “Smiths”) appeal from the trial court’s order dismissing their case with prejudice. The Smiths sued the City of Tucson, Michael Rankin, and William Navarro (collectively “the city”), alleging the city had violated their rights by serving them with a criminal citation involving structures on their property. The city moved to dismiss the complaint based on res judicata, and the trial court granted the city’s motion.

¶2 The Smiths now contend that the trial court erred because, inter alia, a dismissal on the grounds of res judicata was improper. “We review an order granting a motion to dismiss for abuse of discretion.” *Dressler v. Morrison*, 212 Ariz. 279, ¶ 11, 130 P.3d 978, 980 (2006).

¶3 Although the Smiths’ briefs are peppered with unnecessary, vitriolic comments about individuals involved in this and other cases brought by them, they make no legal argument to support their assertion of legal error. Consequently, this argument is waived. *See* Ariz. R. Civ. App. P. 13(a)(6) (“An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.”); *Polanco v. Indus. Comm’n of Ariz.*, 214 Ariz. 489, n.2, 154 P.3d 391, 394 n.2 (App. 2007) (appellant’s failure to develop and support argument waives issue on appeal). And to the extent that the Smiths raise new arguments in their reply brief, we do not consider them. *See Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, n.1, 111 P.3d 1003, 1005 n.1 (2005).

¶4 Moreover, even if the Smiths’ argument were not waived, it is without merit. The city argued below that the case should be dismissed based on the principle of res judicata, also referred to as claim preclusion, because it involved the same issues and the same parties as an earlier case that already had been decided. Under the doctrine of res judicata, a judgment on the merits in a prior action bars a later action involving the same parties or their privies based on the same cause of action. *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986).

¶5 When an order dismissing a case does not specify whether the case is dismissed with or without prejudice, Rule 41(b), Ariz. R. Civ. P., dictates that the ruling “operates as an adjudication upon the merits.” Consequently, even if the dismissal of an earlier action does not specify it was dismissed with prejudice, the dismissal would be regarded as a judgment on the merits, and a later action involving the same issues and the same parties would be barred by res judicata. *See Phillips v. Ariz. Bd. of Regents*, 123 Ariz. 596, 597-98, 601 P.2d 596, 597-98 (1979). And a dismissal for failure to state a claim is a judgment on the merits and has res judicata effect. *Tucson Airport Auth. v. Certain Underwriters at Lloyd’s, London*, 186 Ariz. 45, 46, 918 P.2d 1063, 1064 (App. 1996).

¶6 On appeal, the Smiths concede the issues and the parties are the same in the case underlying this appeal as in the earlier case upon which the city relied in arguing this action was barred by res judicata. Nevertheless, they seem to be arguing that res judicata does not apply because the earlier case was dismissed without prejudice. The final judgment in that case, however, is silent as to whether the dismissal was with or without

prejudice; it reads, in relevant part: “IT IS ORDERED dismissing Plaintiffs’ Complaint.” Thus, although the judgment does not state explicitly that the dismissal was with prejudice, the case was in fact dismissed with prejudice. See Ariz. R. Civ. P. 41(b); *Phillips*, 123 Ariz. at 597-98, 601 P.2d at 597-98. And the judgment was on the merits because the trial court concluded the Smiths had failed to state a claim upon which relief could be granted. See *Tucson Airport Auth.*, 186 Ariz. at 46, 918 P.2d at 1064. Furthermore, any alleged irregularities the Smiths claim occurred in that prior proceeding do not prevent the judgment from having res judicata effect. See, e.g., *Gilbert v. Bd. of Med. Exam’rs*, 155 Ariz. 169, 174-75, 745 P.2d 617, 622-23 (App. 1987) (irregularity in prior proceeding does not preclude res judicata effect). Therefore, the trial court correctly found the Smiths’ later action, which resulted in this appeal, barred by res judicata.

¶7 In light of the foregoing, we affirm the trial court’s order dismissing the Smiths’ complaint with prejudice.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge